89-710

No. __-____

IN THE

Supreme Court of the United States

October Term, 1989

ALASKA DIVERSIFIED CONTRACTORS, INC.,
AND FISCHBACH & MOORE OF ALASKA, INC.,
d/b/a ALASKA DIVERSIFIED-FISCHBACH,
A JOINT VENTURE OF ALASKA CORPORATIONS,

Petitioners,

v.

LOWER KUSKOKWIM SCHOOL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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QUESTION PRESENTED

Is it a denial of due process under the Fourteenth Amendment to the United States Constitution for a State Supreme Court to reverse a contractor's $10 million judgment against a school district on the basis of an original fact finding made by the appellate court with respect to an issue *that was not litigated in the trial court*, particularly when the appellate fact finding is directly contrary to the basis upon which the parties tried the case and upon which the jury was instructed (without objection)?

LIST OF PARTIES

Petitioners are Alaska Diversified Contractors, Inc., and Fischbach & Moore of Alaska, Inc., a joint venture of Alaska corporations doing business as Alaska Diversified-Fischbach. The respondent is the lower Kuskokwim School District, which operates numerous schools in rural Alaska.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

OPINIONS BELOW

On May 10, 1984 the Alaska Superior Court entered judgment in favor of petitioner ADF against respondent School District in the amount of $10,055,024.20 (A.46-48). The Alaska Supreme Court reversed that judgment in an opinion reported at 734 P.2d 64 (Alaska 1987)(A.49-56). The Alaska Superior Court subsequently entered a Judgment After Appeal dated October 27, 1987 (A.70-74) which dismissed with prejudice petitioner ADF's claims. The Alaska Supreme Court affirmed that judgment in an opinion dated July 28, 1989, reported at ____P.2d____ (Alaska 1989)(A.75-92).

JURISDICTION

The judgment sought to be reviewed was entered by the Alaska Supreme Court on July 28, 1989. This petition was filed within ninety (90) days thereafter. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises from an extraordinary public construction contract and an even more extraordinary appellate-level fact finding by the Supreme Court of Alaska used to overturn a $10 million judgment against a public school district of Alaska. We now develop the factual and procedural background underlying the Contractor's argument that the Alaska Supreme Court's action denied the contractor due process and that the clear injustice and major economic consequences of this ruling warrant the grant of certiorari.

1. **At a Pre-Bid Meeting, the School District's Contract Manager Told All Bidders That the Contract's Extraordinarily Low Liquidated Damages Were Intended as the Only Penalty That Would be Enforced for Up to Eleven Months of Contractor Delay Beyond the Nominal Completion Date of August 31, 1980 (Thereby Encouraging Lower Bids in Reliance Upon a Flexible Work Schedule).**

In 1976, the State of Alaska signed a consent decree in which it agreed to fund construction of public schools in dozens of native communities. This "Molly Hooch" decree required the state to accomplish the construction of schools here involved by the fall of 1980. The School District undertook to administer construction of the numerous schools to be built in its remote area.[1]

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[1] This ambitious building program undertaken by the State was consistent with the boom times in Alaska in the mid and late seventies. Unfortunately, by the time the full bill came due — in the form of ADF's $10 million plus judgment, first reviewed by the Alaska Supreme Court in 1987 — Alaska state government was in fiscal crisis:

> Battered by hurting economies and shaky revenue estimates, 21 states have already cut their budgets midway through fiscal 1987, according to the latest report by the National Association of State Budget Officers. Several other states are also expected to revise already-enacted budgets. *Forced to make the biggest cuts were the western states heavily dependent on oil and other commodities. Alaska slashed its budget by 13 percent,* as did Texas, which must undergo another round of cuts soon. Wyoming cut its labor budget by 10 percent. Bureaucrats beware: Many states have decided that labor costs must be reduced to balance the budget. *In Alaska, state employees were asked to take a 10 percent pay cut and work more hours.* In Wyoming, which has cut its budget twice for a total of $72 million, state employees were forced to accept two days off without pay. The states' financial health remains better than it was in the 1983 recession, when 39 states cut their budgets, the NASBO said. But

(footnote continued on next page)

But there was a problem. Having waited until 1979 to award construction contracts, the School District recognized that contractors would submit "exorbitant" bids if completion of all schools was actually *required* by fall of 1980. The School District conceived a solution entailing use of a novel liquidated damage provision. Although the nominal contract completion date was August 31, 1980, contractors were for the first eleven months thereafter subject to an inordinately small liquidated damage of $200 per week. After eleven months, the assessment increased *fourteen* times to $2800 per week. The School District intended the nominal penalty during the first eleven months of delay to "stand out like a neon light."

At the pre-bid conference, the School District (speaking through its Contract Manager) spelled out its intention. *Contractors (including ADF) were told that the only penalty to which they would be subject for the first eleven months of delayed completion would be the nominal liquidated damages and that they could be terminated for default* (pursuant to a contract provision provided therefor) *only thereafter.* Upon the basis of such evidence the jury concluded (by special verdict) that ADF was

> entitled under its Contract with LKSD to complete the schools up to eleven months after the written contract completion date, subject only to payment of liquidated damages as set forth in the written contract revision.

A.39.

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states' economies will face hard times in fiscal 1988. "For most states," the study said, "the fiscal forecast will remain bleak. *In several, the economy is not producing rainy days. It is battering states' budgets with hurricane force.*"

At A Glance; A Weekly Checklist of Major Issues, NAT'L J., Jan. 24, 1987 at 4 (emphasis added).

It is undisputed that the financial burden of the Contractor's $10 million judgment against the School District would have been borne by the State of Alaska.

By promising to enforce the contract with a flexible completion date (subject only to nominal liquidated damages), the School District secured the Contractor's low bid to construct schools at ten remote native villages.

2. After Contract Award, the School District Hired a New Contract Manager and Demanded That the Contractor Complete by August 31, 1980, or Else Suffer Termination of Its Contract for Default, and the Contractor Obtained a $10 Million Judgment for Its Extra Costs of Complying With This Demand.

After contract award the School District replaced its Contract Manager and refused to honor its pre-bid promises regarding interpretation of the unique liquidated damages clause. The School District now threatened the Contractor with default termination (as well as the imposition of both liquidated *and* actual damages) if it did not complete all schools by August 31, 1980. The jury's special verdicts (A.38-45) found that the Contractor incurred damages in complying with the School District's demand for an August 31, 1980 completion, and it recovered a judgment of $10,055,024.20. A.49.

3. In The Contractor's Suit to Recover the Additional Cost of Completion by the Fall of 1980, the School District Never Made a Parol Evidence Objection to Any Evidence, and Approved Instruction 18 Which Was Inconsistent With Any Application of the Parol Evidence Rule, With the Result That the Issue of Contract Integration or Non-Integration Was Not Litigated.

Nowhere in the transcript's 25 volumes and 4171 pages are there to be found any objections interposed by School District counsel to any evidence on the basis of the parol evidence rule. Moreover, the School District did not object to Instruction 18's indication that:

> Depending upon how you weigh the evidence, *the contract between the parties may include terms different from or in addition to those contained in the contract documents.*

A.12 (emphasis added). Because the parol evidence rule would preclude evidence of terms *different* from those contained in the written contract, Instruction 18 — which recognized the possibility of proof of such varying terms — was inconsistent with any application of the parol evidence rule to bar evidence of such different terms.

4. The Contractor, the School District, and the Trial Court Tried This Lawsuit on the Basis of a Common Understanding That the Parol Evidence Rule Was a "Dead Letter" in Alaska.

The Alaska Supreme Court in *Nat'l Bank of Alaska v. JBLK of Alaska, Inc.*, 546 P.2d 579, 582-585 (Alaska 1976) held that in connection with application of the parol evidence rule, evidence of the extrinsic circumstances surrounding the formation of a contract could always be examined to determine whether there is an ambiguity in the contract terms, as opposed to basing a determination of ambiguity solely on a review of the document itself. Subsequent cases appeared to apply a similarly liberal application of the parol evidence rule. *E.g., Wright v. Vickaryous*, 598 P.2d 490 (Alaska 1979) *Mitford v. Lasala*, 666 P.2d 1000, 1005 (Alaska 1983); *Stordahl v. Gov't. Employees Ins. Co.*, 564 P.2d 63, 65 (Alaska 1977); *McMillan v. Anchorage Community Hosp.*, 646 P.2d 857, 862-63 (Alaska 1982). On the basis of these and similar cases, both parties in this litigation — and the trial court — tried this lawsuit on the basis of a common assumption that the parol evidence rule was a dead letter in Alaska. The trial court so stated on record following the Alaska Supreme Court's 1987 opinion:

> And we [trial judge Milton M. Souter and ADF and School District counsel] certainly have that in Alaska prior to this LKSD/ADF case. *And Mr. Oles [ADF counsel] is right when he says that we all talked about the fact that the*

> *parole [sic] evidence rule was practically a dead letter in Alaska at the time this case went to trial.* And it had been eroded so thoroughly in the JBL&K case was one of them that no one has mentioned here today. Huett, Leavit, Martin & Kern (ph) I think was the name of it versus NBA or vice versa, NBC versus JBL&K, plus the cases that Mr. Oles cited in oral argument here.
>
> *The parole [sic] evidence rule appeared to be something that you just found some way around in Alaska. And it seemed to be the way the Supreme Court always did until this case.*

A.63 (emphasis added).

While the School District at the start of trial had submitted two alternate forms of instruction with respect to contract integration, Nos. 29 (A.2) and 30 (A.7), the former of which could be construed as applying a traditional formulation of the parol evidence rule, the School District did not object at time of jury instruction to the failure to give its proposed instruction No. 29. *See* A.16-37 (which comprises all of the School District's objections to proposed instructions). Rather, it objected to the failure to give its instruction No. 30 which expressly recognized the possibilty of "proof by a preponderance of the evidence as to [an] interpretation of the contract which is different from the contract as written." A.7. This proposed instruction was thus also inconsistent (along with No. 18) with an application of the parol evidence rule. Moreover, although the School District did object to Instruction No. 19 (A.28-29), which addressed contract interpretation and contemplated reference to "oral representations or clarifications" (A.13) in determining "the terms of the parties' contract" and their "reasonable expectations" (A.13), it did not object to the instruction's allowing consideration of extrinsic evidence, and indeed *its objection indicated its agreement that extrinsic circumstances could be considered and that an interpretation "different from the written document" could be proven.* A.29.

5. **The Supreme Court of Alaska Reversed the Contractor's Judgment on the Basis of an Original Appellate Fact Finding That the Contract Was Integrated, and That Evidence of the School District's Pre-bid Representation (That the Contractor Had Eleven Months Beyond August 31, 1980 to Complete the Schools Subject Only to Nominal Liquidated Damages) Was Barred Under the Parol Evidence Rule as Being Inconsistent With the Specified Contract Completion Date of August 31, 1980.**

The Alaska Supreme Court in its 1987 opinion first summarized the facts:

> The contracts state on their face that completion was required by August 31, 1980. ADF, however, presented evidence that the School District told ADF during a pre-bid conference it could actually complete construction up to eleven months later and that this was the purpose behind a contract provision which imposes only nominal liquidated damages for the first eleven months after August 31.
>
> After work began, the School District pressured ADF to complete the schools by August 31, 1980. ADF employees testified that they did accelerate the work pace in response to this pressure. ADF seeks compensation for its costs resulting from what it perceives as this unwarranted acceleration.

A.50-51.

While not challenging the jury's special verdicts, the Alaska Supreme Court nevertheless reversed on the basis of the parol evidence rule. *It did so on the basis of an original fact finding*[2] *that there was a contract integration and its*

[2] The question whether the parties have assented to a specific writing as a complete and accurate integration of the terms of their contract *is always a question of fact.* Generally, it seems to have been determined, or an affirmative answer assumed, by the court.

(footnote continued on next page)

conclusion that the pre-bid discussion varied the August 31, 1980 contract completion term. The court stated:

> *Although the court below did not rule on whether the contracts were integrated, we can make that ruling because the question of integration is one for the court. Mitford v. de Lasala*, 666 P.2d 1000, 1004 (Alaska 1983); *Alaska Northern Development, Inc. v. Alyeska Pipeline Service*, 666 P.2d 33, 37 (Alaska 1983), *cert. denied*, 464 U.S. 1041, 104 S.Ct. 706, 79 L.ed. 2d 170 (1984); Restatement, *supra* § 209(2), and comment *c*.
>
> First, we must determine whether the agreements are integrated. According to the Restatement: "Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression." Restatement, *supra* § 209(3).
>
> *Here, we have no doubt that the agreements were integrated.* They contain thirty-six pages (plus supplementary provisions), of sixty specific articles, including detailed provisions on every subject from definitions to payment of taxes to cleanup responsibilities. In our view, it would be unreasonable to hold that the parties did not intend these provisions to embody their complete agreement. Or put another way, the oral statements made at the pre-bid conference do not negate the lengthy and detailed written agreements which the parties signed subsequently.

Probably it is wise, in most cases, for the court to assume the burden of determining this issue of fact, *although it is never wise to assume an affirmative answer.* There must be many cases, however, in which the evidence of what the parties said and did, before and at the time of preparing or delivering a writing, is so nearly equal in weight and credibility that the court will desire the aid of a jury's verdict. If so, there is no law against getting such aid.

3 *Corbin on Contracts* § 573, at 571 (1960) (emphasis added).

> The next question is whether the evidence offered by ADF contradicts or varies the writings. In our view it does. The contracts state that completion was due on August 31, 1980. They also state that if the contractor, *i.e.*, ADF, fails to complete the contracts by the deadline, the School District could terminate the contracts. ADF's evidence, however, indicates that ADF could complete construction eleven months after the deadline without breaching the contract. That is, the School District could not use the threat of termination to force ADF to complete the project by August 31, 1980. Thus, since ADF's evidence contradicts the written agreements, the parol evidence rule bars the court or the jury from using this evidence.

A.53-56 (emphasis added).

6. On Remand, the Trial Court Dismissed ADF's Claims on the School District's Motion, and the Alaska Supreme Court in a Second Appeal Rejected ADF's Argument That the Supreme Court's Appellate Finding of Integration, Without a Trial of That Issue, Denied the Contractor Due Process of Law.

On remand, the Contractor unsuccessfully argued that the parol evidence precluded by the Alaska Supreme Court could alternatively be submitted to support recovery under a theory of promissory estoppel. The trial court dismissed ADF's claims (A.70-74) and ADF appealed for a second time to the Alaska Supreme Court.

The Contractor's central argument on the second appeal was that the Alaska Supreme Court's original fact finding of integration, when that issue had not even been litigated in the trial court, denied ADF due process of law. The Alaska Supreme Court rejected the argument, stating:

> ADF's argument that this court could not have determined that the contracts were integrated also lacks merit.

> As we stated in our prior opinion, that question is one for the court. *Lower Kuskokwim*, 734 P.2d at 63. *See also Mitford v. de Lasala*, 666 P.2d 1000, 1004 (Alaska 1983); *Alaska Northern*, 666 P.2d at 37; Restatement (Second) of Contracts § 209(2) & comment *c*. It is a question which this court is as well situated to decide as the trial court. ADF's contention that by so ruling this court unconstitutionally deprived it of the opportunity to be heard as the issue of integration lacks merit. ADF presented its arguments to this court. The evidence which would prove or disprove integration was admitted at trial for the purpose of proving the existence of a prior inconsistent agreement. The thrust of ADF's argument below was that the parties intended the prior agreement to survive the execution of the contract.

A.85-87 (emphasis added).

ADF first raised its due process issue on the second appeal, following the trial court's preclusion of its recovery on the alternate promissory estoppel theory.

REASONS FOR GRANTING THE WRIT

1. **The Alaska Supreme Court Denied the Contractor Due Process of Law By Depriving It of a $10 Million Judgment On the Basis of an Original Fact Finding of Contract Integration When the Issue Was Never Litigated Because the School District Never Made a Parol Evidence Objection and Approved an Inconsistent Instruction to the Jury.**

The petition should be granted under Rule 17.1.(c) because the Alaska Supreme Court's opinion issued July 28, 1989 abridges ADF's right to due process under the Fourteenth Amendment of the United States Constitution, as established by opinions of this Court. *The long and the short of it is that*

ADF was deprived of a $10 million judgment on the basis of an original appellate fact finding as to an issue that was not litigated. Moreover, the reason the issue of contract integration was not litigated was because the School District never made the objection that would have created an occasion or necessity to find the existence or nonexistence of an integration.

The extraordinary injustice done to ADF was concisely stated by the trial court upon remand after the Alaska Supreme Court's first opinion, at the time of his reluctantly dismissing the contractor's claims. Judge Souter then stated:

> I think it's a rotten result. *And I think that the Supreme Court in deciding that this was an integrated contract went way beyond its proper function as an appellate court, a clearer example of that I can't even imagine, to hold that this contract was integrated when that was not even the subject of the evidence taking at the trial court, not the result of any finding by the trial court, and not even stated as an integration in the contract documents*[3] *is just absolutely astounding.* And I couldn't agree more — I couldn't disagree more with the Supreme Court's decision.
>
> So, they may enjoy or not enjoy reading my comments in the event that they're showed to them. But at least they

[3] The trial court was correct that the contract contained no integration clause, *i.e.*, an "explicit declaration that there are no other agreements between the parties" except the written contract. Restatement (Second) of Contracts § 209, comment *b* (1981). The Alaska Supreme Court was thus confused when it opined that the contract's "Explanation to Bidders" clause, which merely said that oral explanations of "drawings and specifications" contained in the contract documents would not be binding absent written confirmation, was "functionally equivalent to an integration clause." A.87-88. And moreover, even if such a clause was one of integration (which it is not), it is not conclusive if evidence of extrinsic circumstances proves the existence of a separate oral agreement. *See* Restatement (Second) of Contracts § 209, comment *b* (1981).

> can take heart even though I think their decision is a disaster I followed it to the best of my ability.

A.66-67 (emphasis added).

The trial court thus emphasized the essential basis underlying this petition: ADF was deprived of a $10 million dollar judgment on the basis of an issue of fact that was never litigated. And why was it never litigated? As already seen, the trial court stated the simple reason: the parties understood that the parol evidence rule was "practically a dead letter" (A.63) in Alaska. That understanding, moreover, was reflected in two key actions of the School District:

First, throughout the month-long trial, *no parol evidence objection was ever made to the introduction of any evidence.*

Second, the School District did not object to Instruction No. 18 which expressly — *and inconsistently with any application of the parol evidence rule* — contemplated the possibility of proof of terms "different" from those contained in the written contract.

Nowhere does the Alaska Supreme Court justify how or why the Contractor should have been expected to litigate an issue, *i.e.*, whether there was or was not an integration, when the School District never made the parol evidence objection which *alone* would have created the necessity and occasion to try the issue of integration, as a prelude to a ruling on the objection. Nor does the Alaska Supreme Court explain why ADF was required to litigate the issue of integration, when the School District in effect had *stipulated*, by its lack of objection to Instruction 18, one of either two things: first, that there was no contract integration which would preclude proof of contract terms "different from" the written contract provisions; or second, an understanding that the parol evidence rule was a "dead letter," or otherwise inapplicable under the circumstances. In either case, Instruction 18 is utterly inconsistent

with application of the parol evidence rule to preclude the Contractor's evidence of the owner's pre-bid representations.

We now develop the prior opinions of this Court which establish the denial of due process inflicted by the Alaska Supreme Court upon ADF.

2. It Is a Denial of Due Process for a State Supreme Court to Preclude a Litigant on the Basis of a Finding or Determination Made as an Original Matter on Appeal Without a Proper Opportunity Being Extended to the Litigant to be Heard and to Present its Evidence.

Saunders v. Shaw, 244 U.S. 317, 37 S.Ct. 638, 61 L.Ed. 1163 (1917) illustrates the due process denial complained of here. The clerk's headnote states the applicable principle:

> It is a violation of due process of law for a state supreme court to reverse a case and render judgment absolute against a party who succeeded in the trial court, upon a proposition of fact which was ruled to be immaterial at the trial and concerning which he had therefore no occasion and no proper opportunity to introduce his evidence.

244 U.S. at 317.

Saunders' facts are analogous. Plaintiff landowner sued in Louisiana state court to enjoy collection by a public body of a drainage tax. At trial, plaintiff offered to prove that its land was not benefited by the tax sought to be assessed. The trial court sustained an objection to the evidence's admissibilty, but it was set out in the record by an offer of proof. Its objection having been sustained, the defendant drainage district did not offer evidence that the subject property would be benefited. The trial court entered judgment for defendant district.

The Louisiana Supreme Court affirmed. However, subsequently this Court in *Myles Salt Co. v. B'd of Comm'rs.*,

239 U.S. 478, 36 S.Ct. 204, 60 L.Ed. 397 (1916) held that inclusion of an owner's real property within a drainage district, when there was no possibility of benefit thereto, was arbitrary and a deprivation of property without due process under the Fourteenth Amendment. The Louisiana Supreme Court then granted a rehearing, and granted judgment for the plaintiff landowner on the basis of *its* factual finding, based on the landowner's answer and evidence presented by way of offer of proof, that the land was marshy and could not be benefited. The defendant drainage district's petition for rehearing was denied.

The United States Supreme Court reversed, stating as follows:

> The intervening defendant thereupon applied for a rehearing, but the court declined to consider the application under its rule that only one rehearing should be granted. *He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court rules that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view.* The Chief Justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. *Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of The Myles Salt Company's Case that to remand it would be an empty form — a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.*

Saunders, 244 U.S. at 319 (emphasis added).

Saunders' principle controls here. In *Saunders*, the issue of benefit to the land was unlitigated because of an inadmissibility ruling. 244 U.S. at 317. Here, the issue of integration was unlitigated for any or all of the following reasons: the School District made no parol evidence evidentiary objections; the School District conceded non-integration; the trial court and the parties assumed that the parol evidence rule was a dead letter in Alaska. *For whatever reasons, the issue was unlitigated. Moreover, the School District's lawyers and witnesses never aruged contract integration to the jury, and the contract itself did not contain a traditional integration clause (e.g.,* stating that it contained the parties' complete agreement). Therefore, ADF cannot constitutionally be denied an opportunity to now litigate the issue and present its evidence.

Saunders, supra, was followed in *Walker Mining Co. v. Industrial Accident Comm'n*, 35 Cal. App. 2d 257, 95 P.2d 188, 190 (1939):

> In the case of *Saunders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163, it was held that the submission and determination of a case without giving a party thereto the opportunity of presenting his evidence on a material issue resulted in a denial of due process guaranteed by the fourteenth amendment to the federal Constitution, U.S.C.A. *The administration of justice is founded on the principle that every litigant shall have a fair opportunity to present to the court material evidence in support of his valid claim. . . .*

(Emphasis added). ADF has also been denied "a fair opportunity to present to the court material evidence in support of [its] valid claim." 95 P.2d at 190.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), is also instructive. Plaintiff trust company sued to enjoin assessment of certain allegedly discriminatory taxes. The injunction was denied. The Missouri Supreme Court affirmed, holding that the state tax commission had jurisdiction to act upon the plaintiff's claims, but

because plaintiff had not sought such relief it was guilty of laches and its equitable action was precluded. Yet, six years earlier the Missouri Supreme Court had held contrarily that the state tax commission lacked power as to such claims:

> The possibility of relief before the tax commission was not suggested by anyone in the entire litigation until the [Missouri] supreme court filed its opinion on June 29, 1929. Then it was too late for the plaintiff to avail itself of the newly found remedy.

Brinkerhoff-Faris, 281 U.S. at 677.

Justice Brandeis explained the due process denial:

> . . . We are of the opinion that the judgment of the supreme court of Missouri must be reversed, because it has denied to the plaintiff due process of law — using that term in its primary sense of an opportunity to be heard and to defend its substantive right.
>
> First. It is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense.
>
> . . .
>
> If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. . . .
>
> . . .
>
> *Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense, — whether it has had an opportunity to present its case and be heard in its support.* Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to re-examine and overrule the *Laclede Land & Improv. Co.* Case. Neither of these matters raises a federal question; neither is subject to our review. *But, while it is for the state courts to determine the adjective as well as the substantive law of the state,*

> *they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.* Compare *Postal Tel. Cable C. v. Newport*, 247 U.S. 464, 475, 476, 38 Sup. Ct. Rep. 566, 62 L. Ed. 1215, 1220, 1221 (1918).

Brinkerhoff-Faris, 281 U.S. at 677-682 (emphasis added).

ADF has similarly been deprived of any "real opportunity to protect it[s]" interest and constitutional right to litigate the issue of contract integration. *Brinkerhoff-Faris*, 281 U.S. at 682. Just as the defendant in *Saunders, supra*, could not be expected to have litigated the issue of the existence of benefit to the subject land when the trial court had sustained its objection to admission of plaintiff's evidence showing a lack of benefit, and just as the plaintiff in *Brinkerhoff-Faris, supra*, could not be expected to take advantage of an administrative remedy prior to the Missouri Supreme Court's creating it, neither can ADF be required to have litigated an integration issue which the School District either never raised, or abandoned, and/or impliedly conceded pursuant to the parties' common understanding that the parol evidence rule was a "dead letter" (in the trial court's words) in Alaska.

Perhaps as simple a statement of the rule as can be found is in *Jackson v. DeSoto Parish School Bd.*, 585 F.2d 726 (5th Cir. 1978):

> . . . Such findings of fact can be made only after a hearing at which both parties have an opportunity to be heard. This is a basic requirement of due process. As we held in *Thompson v. Madison County Board of Education*, 5 Cir. 1973, 476 F.2d 676, 678:
>
> > *Due process mandates that a judicial proceeding give the affected parties an opportunity to be heard on the allegations asserted in the complaint and to present*

> *evidence and argument on the contested facts and legal issues framed by the answer to the complaint.* Before a district court adjudges, it must determine the facts for itself on the basis of the proffered evidence. . . . *In short, a court can only render a judgment after the parties have been afforded a full and fair trial on the claims properly before the court.*

Jackson, 585 F.2d at 730 (emphasis added).

Also pertinent are two recent Hawaii district court actions involving an effective overruling of final decisions of the Hawaii Supreme Court on the basis of a denial by that court of procedural due process. *Sotomura v. County of Hawaii* was before the federal district court on a motion to dismiss and later for trial; separate opinions appear at 402 F. Supp. 95 (D.C. Haw. 1975) and 460 F. Supp. 473 (D.C. Haw. 1978). Plaintiff landowners had previously been defendants in litigation in the Hawaii state courts wherein a public body successfully condemned for public use certain waterfront property. On appeal from the condemnation award, the Hawaii Supreme Court overruled earlier precedent which had been relied upon by the trial court and the parties, by holding that the seaward boundaries of the waterfront lot should have been located along the upper reaches of wash of waves as evidenced by the vegetation line and not as evidenced by the debris line. *See County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), *cert. denied*, 419 U.S. 872, 95 S.Ct. 132, 42 L.Ed.2d 111 (1974). The effect was to reduce the amount of land for which the owners were entitled to compensation. The landowners' attempts to obtain relief from the Supreme Court of Hawaii by a petition for rehearing were unsuccessful.

After denial of a petition for certiorari to the United States Supreme Court, the landowners sued the County of Hawaii in federal district court, seeking declaratory and injunctive relief. After trial, injunctive relief was granted against the County. The court's holding speaks directly to the issues in this case:

Surprisingly, the appellate court decided the case upon the basis of ownership, determined according to a rule and presumption inconsistent with the legal assumptions upon which the parties and the trial court had proceeded.

. . .

The failure of the Hawaii Supreme Court to give the Owners a meaningful hearing before relocating their boundary inland affords adequate ground for granting the injunction requested by the Owners.

Conclusions

1. This Court has jurisdiction of the parties and the subject matter of this case.

2. The claims of the Owners in this action were not litigated and could not have been litigated in the Third Circuit Court, State of Hawaii, or in the Hawaii Supreme Court, absent a granting of the Petition for Rehearing, and are not barred by the doctrine of *res judicata (Scoggin v. Schrunk*, 522 F.2d 436 (9th Cir. 1975), cited by defendants, is clearly distinguishable).

3. In directing the use of the vegetation line to locate the seaward boundary of Lot 3, the State of Hawaii, through the Supreme Court of Hawaii, *has taken the Owner's property without their having been afforded any notice of the intended action, or any hearing or opportunity to present evidence or argument, or any trial by jury of the issues of fact bearing on the court's ruling, in violation of the rights, privileges and procedures secured to the Owners by the due process clause of the Fourteenth Amendment to the United States Constitution.*

460 F. Supp. at 477-82 (emphasis added).

The same due process analysis applies here. The Alaska Supreme Court also "decided the case upon the basis of . . . a rule and presumption inconsistent with the legal assumptions

upon which the parties and the trial court had proceeded." 460 F. Supp. at 477. Its factual finding (contrary to the implied stipulation of the School District) with respect to an unlitigated issue denied ADF

> any hearing or opportunity to present evidence or argument, or any trial by jury of the issues of fact bearing on the court's ruling, in violation of the rights, privileges and procedures secured to the Owners by the due process clause of the Fourteenth Amendment to the United States Constitution.

460 F. Supp. at 482.

The district court's reference in *Sotomura*, 460 F. Supp. at 477, to the "landmark case" of *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D.C. Haw. 1977) invites consideration. The underlying Hawaii state litigation involved declarations of the parties' water rights. All parties at trial had accepted long-established Hawaii law which recognized that surplus stream water could be privately owned and transferred. The Hawaii Supreme Court on appeal, *sua sponte*, reversed this prior law without any opportunity for argument being extended to the parties. The district court first analyzed the Hawaii Supreme Court's opinion's reasoning in language which is of some relevance to this case:

> The entire rationale of the majority is one of the grossest examples of unfettered judicial construction *used to achieve the result desired regardless of its effect upon the parties, or the state of the prior law on the subject.*

Robinson, 441 F. Supp. at 568 (emphasis added). It then concluded that there had been a denial of due process:

> All parties and the trial court accepted as unquestionably settled water rights law in Hawaii . . .

> As appears above and as decried by Justice Marumoto in dissent in *McBryde I*, the effect of the judgment of the Supreme Court was to deprive the plaintiffs of their property, water and water rights, *without affording any of them an opportunity to be heard in their defense. The state court violated not only its own rules, but the state law as well, by deciding the case on issues that were never raised or argued.*
>
> Thereafter on the almost farcical "rehearing," although the due process issues were urged by the plaintiffs, the court refused to permit argument thereon or consider the same. Rather, the court extended a clearly *pro forma* invitation to the plaintiffs to "prove to us why we were wrong" on issues and conclusions assumed *sua sponte* and decided *sua sponte* by the court.
>
> *On this basis alone the judgment of the court would have to be declared void, for if permitted to remain in full force and effect, plaintiffs have been deprived of property rights without ever having had a fair and meaningful opportunity to defend against their being handed over to the State on a silver platter without even a request by the State for the gift.*

Robinson, 441 F. Supp. at 580 (emphasis added).

Again, the parallels are clear. Here also the "state court... decid[ed] the case on issues that were never raised or argued." *Id.* at 580. The Ninth Circuit affirmed. *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D.C. Haw. 1977), 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 447 U.S. 902, 106 S. Ct. 3269, 91 L. Ed. 2d 560 (1986) (emphasis added). While this Court vacated *Robinson* on other grounds, the Ninth Circuit has recognized its continuing validity. *See MacKay v. Pfeil*, 827 F.2d 540, 545 (9th Cir. 1987).

3. The Alaska Supreme Court Denied ADF a Proper Occasion and Fair Opportunity to Introduce Its Evidence on the Issue of Contract Integration, and its Rejection of ADF's Argument Itself Highlights the Denial of Due Process Inflicted Upon ADF.

The Alaska Supreme Court rejected ADF's due process argument as follows:

> ADF's contention that by so ruling this Court unconstitutionally deprived it of the opportunity to be heard as to the issue of integration lacks merit. ADF presented its arguments to this Court. The evidence which would prove or disprove integration was admitted at trial for the purpose of proving the existence of a prior inconsistent agreement. The thrust of ADF's argument below was that the parties intended the prior agreement to survive the execution of the contract.

A.83.

How *convenient* it is for the Alaska Supreme Court to assume that all of the evidence which ADF would have submitted on the issue of integration *was submitted*, even though the issue was — in the trial court's words — "not even the subject of evidence taking at the trial court." A.66. That the court can so cavalierly conclude, and itself find an integration based simply on the length of the written contract and the number of its provisions(!),[4] perhaps itself best illustrates

[4] The Alaska court stated there could be "no doubt" the contract was integrated because of its "36 pages . . ." including detailed provisions on every subject from definitions to payment of taxes to cleanup responsibilities." A.54. Yet Corbin points out that a mere inspection of the documents is never sufficient to resolve the issue of integration:

> No written document is sufficient, standing alone, to determine any one of [certain issues, including that of contract integration] them, however long and detailed it may be,

(footnote continued on next page)

the denial of due process inflicted upon ADF. In this context, the following comment of this Court in *Saunders, supra*, is apposite:

> Probably the majority of the [Louisiana] Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principle of The Myles Salt Company's Case that to remand it would be an empty form — a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

244 U.S. at 319 (emphasis added).

So here the Alaska court states that it has "no doubt that the agreements were integrated." A.54. And it also obviously has no doubt that even if the issue were to be the subject of a new trial, ADF could muster no new evidence not already in the record. But how can it know that? Here, as in *Saunders*, there is not "in the record an absolute warrant for the assumption . . ." 244 U.S. at 319.

We frankly concede that there is in the record, notwithstanding the non-litigation of the integration issue, ample evidence which would support a finding of non-integration. After all, the *whole idea* of the School District was precisely to *appear to be doing one thing for the sake of political advantage, i.e.*, specifying a completion date of August 31, 1980, *while in fact doing something else, i.e.*, encouraging the contractors

---

> however formal, and however many may be the seals and signatures and assertions. *No one of these issues can be determined by mere inspection of the written document.*

3 *Corbin on Contracts* § 573, at 360 (1960) (emphasis added). Indeed, even an integration clause in the contract (which was here lacking [see preceding note 3]) may not be conclusive. Restatement (Second) of Contracts § 209, comment *b* (1981).

to submit bids (and lower prices) by assuring them that completion would be allowed up to eleven months later. This fact pattern is a classic non-integration situation, and a contrary conclusion would allow the School District to work the equivalent of fraud on its public contractors.

If there were to be a trial on the issue of integration at which ADF had proper occasion and opportunity to do so, it could ask either or both of the contracting parties if it was not true that the reason there was no integration clause in the contract, was that the School District wanted the oral pre-bid representations and agreement to survive the execution of the written contract, and to be separate therefrom, so that it could *appear* to be doing something different from the reality, for its political advantage. If the answer were yes, what then would become of the Alaska court's claimed certainty of integration?

CONCLUSION

We can do no better than to reiterate the trial court's opinion:

> I think it's a rotten result. And I think that the Supreme Court in deciding that this was an integrated contract went way beyond its proper function as an appellate court, a clearer example of that I can't even imagine, to hold that this contract was integrated when that was not even the subject of the evidence taking at the trial court, not the result of any finding by the trial court, and not even stated as an integration in the contract documents is just absolutely astounding. And I coudn't agree more — I couldn't disagree more with the Supreme Court's decision.

A.66.

Respectfully submitted this 26th day of October, 1989.

OLES, MORRISON & RINKER

By STUART G. OLES*
ARTHUR D. McGARRY
DOUGLAS S. OLES

Attorneys for Petitioners
Counsel of Record (*)

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, INC., d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations,	)	
Plaintiff,	)	
v.	)	
LOWER KUSKOKWIM SCHOOL DISTRICT,	)	
Defendant.	)	Case No. 3AN-82-280-CI

Case No. 3AN-82-280

ADF JURY INSTRUCTIONS
(Nos. 29 and 30)

JURY INSTRUCTION NO. 29

It is your duty to determine the exact terms of the contract between the parties. In this case, the only contract term you must find is the completion date of the contract agreed to by the parties. There is no dispute that all other rights and obligations of the parties under the contract were as written in the contract documents and you must apply those written terms where applicable to any of the claims made by AD-F. AD-F bears the burden of proof by a preponderance of the evidence as to any interpretation of the contract which is different from the contract as written.

In determining the disputed term of the contract you must first look solely to the written contract documents as a whole and decide whether there is any ambiguity in the written contract as to

the completion date of the work. The mere fact that the parties disagree as to the interpretation of the contract's completion date does not necessarily imply that an ambiguity exists in the contract regarding that term. Rather, an ambiguity exists only when the written contract documents, taken as a whole, are reasonably subject to differing interpretations as to the completion date. A reasonable interpretation is one which gives effect to all terms of the written contract as a whole without rendering any one provision null or void or creating conflict between the written contract's various parts. If you find the written contract documents are capable of only a single reasonable meaning as to the completion date of the work, then you must find that to have been the agreement between the parties

and apply that term to any claims made by AD-F.

If you find the written contract is subject to more than one reasonable interpretation, then you must determine the reasonable intention of the parties when they entered the contract regarding the completion date. To do this you must consider the contract documents as a whole as well as all evidence of the surrounding circumstances of the contract's formation and performance - that is evidence of the actual conduct of the parties. Testimony by the parties given at trial as to their understanding or intention at the time the contract was entered is entitled to no weight in your determination, since the law considers that testimony to be self-serving and of little value to determine the parties' real intentions at the time they entered

the contract. Rather, you must look to the express manifestations or actual conduct of each party at the time the contract was entered and during its performance in order to determine the parties' understanding and intent. If you determine that in light of all the circumstances, the language of the contract is capable of only a single reasonable meaning, you must find that meaning to have been the intention of the parties. As I previously instructed you, reasonable meaning is one which gives effect to all terms of the contract as a whole without rendering any one provision null or void or creating conflict between the contract's various parts.

A provision for the payment of liquidated damages in a contract does not by itself make the contract one in the alternative; in other words, payment of

liquidated damages is not a substitute for performance in accordance with the contract terms. You must consider the written contract's liquidated damages provision as a part of the evidence as a whole surrounding the formation and performance of the contract in determining the disputed term of the agreement between the parties.

JURY INSTRUCTION NO. 30

It is your duty to determine the exact terms of the contract between the parties. In this case, the only contract term which you must find is the completion date of the contract agreed to by the parties. There is no dispute that all other rights and obligations of the parties under the contract were as written in the contract documents and you must apply those written terms where applicable to any of the claims made by AD-F. AD-F bears the burden of proof by a preponderance of the evidence as to any interpretation of the contract which is different from the contract as written. It also bears the burden of proving it actually relied on that interpretation.

In determining the disputed term of the contract, you should attempt to give effect to the reasonable intentions of

the parties when they entered the contract. To do this you must consider the contract documents as a whole as well as all evidence of the surrounding circumstances of the contract's formation and performance - that is evidence of the actual conduct of the parties. Testimony by the parties given at trial as to their understanding or intention at the time the contract was entered is entitled to no weight in your determination, since the law considers that testimony to be self-serving and of little value to determine the parties' real intentions at the time they entered the contract. Rather, you must look to the express manifestations or actual conduct by each party at the time the contract was entered and during its performance in

order to determine the parties' understanding and intent.

If you determine that in light of all the circumstances, the language of the contract is capable of only a single reasonable meaning, you must find that meaning to have been the intention of the parties. A reasonable meaning is one which gives effect to all terms of the contract as a whole without rendering any one provision null or void or creating conflict between its various parts.

A provision for the payment of liquidated damages in a contract does not by itself make the contract one in the alternative; in other words payment of liquidated damages is not a substitute for performance in accordance with the contract terms. You must consider the written contract's liquidated damages provision as a part of the evidence as a

whole surrounding the formation and performance of the contract in determining the disputed terms of the agreement between the parties.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, INC., d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations,	)	
Plaintiff,	)	
v.	)	
LOWER KUSKOKWIM SCHOOL DISTRICT,	)	
Defendant.	)	Civil Action No. 3AN-82-280

JURY INSTRUCTIONS
(Nos. 18 and 19 as
given by the Trial Court)

JURY INSTRUCTION NO. 18

In given these instructions, I will refer to the term "contract documents." This term is defined in Article 33 of the General Provisions of Exhibit 1.

Depending upon how you weigh the evidence, the contract between the parties may include terms different from or in addition to those contained in the contract documents.

INSTRUCTION NO. 19

You are to determine the terms of the parties' contract so as to give effect to the reasonable expectations of the parties, that is, to give effect to the meaning of the words which the party using them should reasonably have apprehended that they would be understood by the other party. In ascertaining the reasonable expectations of the parties, you should consider the written documents, any evidence of oral representations or clarifications, the objects sought to be accomplished by the contract and the circumstances surrounding its adoption.

In ascertaining the reasonable expectations of the parties, you should attach strong significance to their statements and conduct after entering the contract and before the appearance of any

dispute, to determine how they interpreted the contract. However, testimony by the parties at trial as to their uncommunicated intentions is entitled to little weight in interpreting a contract except where the testimony of both contracting parties expresses the same uncommunicated intentions.

It is a general principle of construction contract law that Supplementary General Provisions may modify, change, delete from or add to the General Provisions of the contract. You are instructed that under this contract the Supplemental General Provisions take precedence over any conflicting terms in the General Provisions.

You are instructed that where a contract provides for liquidated damages, the owner is not entitled to "actual" or "real" damages for late completion.

However, unless the parties otherwise agree, a provision for payment of liquidated damages in a contract does not by itself limit the other party from utilizing other remedies specified in the contract documents.

A reasonable interpretation of a contract is one which gives effect to all the terms of the contract as a whole without rendering any one provision null or void or creating conflict between its various parts. If you find the contract is subject to more than one reasonable interpretation, you must consider the fact that the contract documents were prepared by LKSD and should, therefore, be interpreted more favorably for AD-F.

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, INC., d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations,	)
Plaintiff,	)
v.	)
LOWER KUSKOKWIM SCHOOL DISTRICT,	)
Defendant.	)

No. 82-280 Civil

VOLUME XXV

TRANSCRIPT OF PROCEEDINGS

April 16, 1984

. . .

THE COURT: All right. Let's--can we start then with the jury instructions objections and exceptions? We have a set of identically numbered instructions, and I have to say at this point I don't know what happened to my copy. Are my copies still over at counsel's table?

MR. D. OLES: I believe we have . . .

THE COURT: Do you have two extra copies? Did I have them over there?

MR. HOPKINS: I don't believe you did, Your Honor. You just gave us one. I could be wrong.

THE COURT: I looked in chambers before I came in and I didn't . . .

MR. HOPKINS: You can certainly use our copy. I have a working set of my own that I think is now accurate according to numbering and so we will--I'll use that

and give you back the one that I gave you yesterday.

THE COURT: Okay. I'll just need it for a couple of minutes. All right. We have an identically numbered and identically worded set of jury instructions, consecutively numbered from 1 through 45. There's also a title page and we did work out a special verdict form. What I want to do is simply start with plaintiff--starting with plaintiff, is just have you identify the objections that you have to the various numbered instructions. I'd like to preliminarily state for the sake of the litigating parties, that all of these instructions were prepared in sessions which counsel attended off the record with myself, various positions were argued to some depth and I am specifically requesting counsel to simply place in abbreviated form on the record

their objections to these instructions and not to argue the objections. They've already been argued and the only purpose of this is to preserve counsel's for the purposes of appellate review. And the appeal court should not regard some position as waived with regard to these instructions simply because it is being presented in abbreviated form. Mr. Oles.

MR. S. OLES: Yes, Your Honor. We'll take exception to the giving of instruction number 23, which begins LKSD claims that it and ADF agreed to a modification, Your Honor. We take exception on the ground that there is no evidence to show that there was any such agreement, any such modification. Secondly, because it is irrelevant because no school was shown or claimed to have been done by June 30 and the offer was unilateral. Thirdly, it's inherently confusing because it

invites the jury to find there was an agreement to work through the winter on four of the schools on a chance to get $75,000.00, which we think badly muddies the water. And, finally, without the instruction the defendant can still argue that this was ADF's motivation, but they haven't proven the contract.

And, we also take exception to the next instruction, number 24, which begins as one of its affirmative defenses in which LKSD claims ADF is estopped from claiming it had a right. It allows the defense to be established, among other things, upon showing that ADF represented to LKSD that it would complete its work by the written contract completion date and we assert there is no such representation. Certainly none made with the intent to rely, which we believe to be an

element and a necessary element. That's all we have.

THE COURT: All right. Now, with respect to any exceptions you might have, Mr. Oles, to the failure of the--the refusal of the court to give any of your proposed instructions?

MR. S. OLES: We have no such exception, Your Honor.

THE COURT: Very well. Mr. Hopkins or Mr. Nourse, whoever is going to do it for LKSD.

MR. HOPKINS: Your Honor, with your permission, I would like to address our objections on the substantive defense that the plaintiffs claim, and Mr. Yalowitz regarding the jury instructions relating to the counterclaim.

THE COURT: Excuse me?

MR. HOPKINS: I would like to present our objections as to the jury instruc-

tions going to the main claim and allow Mr. Yalowitz to present his objections . . .

THE COURT: Oh, that's fine.

MR. HOPKINS: . . . to the counterclaim instructions.

THE COURT: That's fine.

MR. HOPKINS: As a preliminary matter, too, I for the record would like to renew our earlier motion for a directed verdict, both on the grounds of the plaintiffs - failure to prove a--present evidence from which the jury could be provided with a reasonable basis to compute damages in this case, as argued earlier, and on the additional grounds that the plaintiff has not presented sufficient evidence for the jury to find notice was properly given or that any demand was given by LKSD to the contractor to perform its work in any manner

other than it wished. We would like to reserve argument on that motion until after the jury's verdict, if that procedure is agreeable to the court.

THE COURT: That's fully acceptable to me. Is it to you, Mr. Oles?

MR. S. OLES: I assume that it would then be a motion for judgment notwithstanding the verdict, if it were made at all, or a motion for a new trial, and that I assume would then be made and noted up in the ordinary course.

THE COURT: I presume that's what you intend, Mr. Hopkins?

MR. HOPKINS: Yes, Your Honor.

THE COURT: All right.

MR. HOPKINS: On that same ground we would object to the court's instruction number 21 which will be read to the jury, which allows the jury to find that the notice requirement has been given--has

been satisfied on something other than written notice.

Similarly, we object to the court's instruction number 22, which again allows the jury to find that notice has been given on some basis other than written notice. And, we finally object to the special verdict form again on that same ground.

Moving to the next series of objections, we object to the court's decision not to give our proposed jury instructions number 36 and 37, those instructions properly state the law on acceleration. The acceleration occurs only on the basis of a written order from the owner. Again, Article 52 of the contract between the parties provided that no changed work was to be performed, or any claim allowed for that work absent a written order. And the Inman case again

supports the strict application of that contract clause.

Similarly, the Alaskan Supreme Court in Northern Corp. versus Chugach Electric Association has held that constructive change order doctrine is not to be applied in this state, which we believe is additional basis. The court has instead in its instructions allowed a breach of contract and in effect an acceleration order to be found on the basis of an expressed or implied demand. We believe there's no basis in law for the court's instruction that the contract can be breached on the basis of an "implied demand."

And, we object to the court's instruction number 22 on that ground and similarly to the special verdict form on that same ground.

Our next series of objections go to the court's failure to give our proposed instructions number 31 and 32, these address agency. We believe the law in Alaska is that an agent authorized to enter a contract on behalf of his principal does not have implied authority to modify, alter or waive the terms of that contract. Plaintiff has presented evidence regarding statements by David Chauvin and relies heavily on those to assert an interpretation of the contract different than as written.

We believe under the Alaska Supreme Court's decision of Spenard Plumbing and Heating Company versus Wright, 370 P.2d 519, and the restatement second of agency section 51, that there can not be a finding of implied authority for an agent to modify or waive the terms of the contract of its principal and the court

should have instructed the jury as set forth in our instructions 31 and 32, that it must find that Mr. Chauvin had expressed authority before it could consider any of his statements for that purpose.

Similarly, we believe our instruction number 32 set forth the appropriate law on apparent authority and the duty of a party relying on apparent authority to make inquiries as to the agent's actual scope of authority, and the fact that failure to do so will be held to have occurred at his peril.

And on that same ground we object to the court's instruction number 20, which sets forth a--only a very brief and limited statement of the law of agency and does not include specific decisions--the specific law announced in the Spenard Plumbing case or the Supreme Court's

decision in State versus Neal and Sons, Inc., 49 P.2d 1016.

Finally, the court's instruction number 20 does not instruct the jury that the burden of proof as to the existence of agency and the scope of authority is on the party seeking to bind the principal with acts of that agent, as required by the court's decision in Grouton (ph) versus Automatic Welding and Supply, 513 P.2d 1122.

Our next series of objections go to the giving of the court's instruction number 19. We have several bases for objection to that instruction. This instruction addresses contract interpretation rules. First, this instruction fails to inform the jury that if they find in light of all circumstances surrounding the contract formation that the written contract is capable of only a

single reasonable meaning they must apply that meaning. That was the holding of the court in National Bank of Alaska versus JBL&K of Alaska, Inc., 546 P.2d 579, and a similar holding in McMillion versus Anchorage Community Hospital, 646 P.2d 857 and other decisions.

Our second ground for objection to instruction number 19 is in its failure to inform the jury that a party asserting an interpretation of contract different from the written document bears the burden of proving it actually relied on the interpretation it asserts. There's considerable federal authority as set forth in our pleadings and briefing on that issue.

Our third ground for objection to the court's instruction number 19 is in paragraph _____ of that instruction. The specific rule of law is that specific

terms when in conflict with general terms take precedence in interpreting a contract. This portion of the instruction improperly highlights the supplementary general provisions and suggest that they may modify and alter the other general provisions, and we believe unduly focuses the jury's attention on the liquidated damages clause, which was found in the supplementary general provisions and which is a major fact upon which the plaintiff relies.

We object--and, along the same grounds as set forth in our objection to the court's instruction 19, we object to the court's failure to give our proposed--LKSD's proposed instruction number 30, which we feel more completely and fully sets forth the rules of contract interpretation to be applied.

Next, we object to the court's refusal to give LKSD instruction 39. While the plaintiff contends it has raised no defense of economic duress to our allegation that it entered a modification of the contract for delivery of four schools early, we believe that the plaintiff has produced evidence and we'll argue that in effect it was--that if it did enter such a modification, it did so because it was coerced or was otherwise under economic duress and the jury should have been properly instructed as to what actually constitutes such a defense.

Our next series of objections go to the instructions on damages. Specifically, we object to the court's failure to give our proposed instructions 44, 45 and 46. And in that same context we object to the court's instruction 29.

Specifically, our proposed instruction 44 sets forth the two elements of damages that the plaintiff in the state under Alaskan law are required to prove, that being causation and reasonable certainty as to proof of amount. And, as set forth in City of Whittier versus Whittier Fuel and Marine Corp., 577 P.2d 216.

Our instruction number 45 is particularly applicable to construction contracts and requires that a contractor claiming additional compensation from the owner prove and present as the basis for his alleged damage computation specific segregated costs attributing those to each specific action or claim wrong of the owner, and that is clearly the federal law as set forth in Boasian (ph) versus U.S., 423 P.2d 1231 and WRB Corp. versus U.S. 183 Court Claims 409, as well

as the state decisions decided in our authority.

Finally, we object to the failure of the court to give our instruction 46, which sets forth the narrow factual findings which must be made before a computation of damages on the total cost basis be permitted. We believe the plaintiff claim is a total cost claim that subtracts total costs incurred--it subtracts from total costs incurred on the project's estimates of what it "should have cost." That method of quantifying damages in a construction case is only allowed under very narrow grounds again as set forth in the federal decisions Boasian versus U.S. and certain state decisions, such as, Huber Hunt and Nichols, Inc. versus Moore, 67 Cal.App.3d 278.

Finally, we object to the court's failure to give our instruction number 65 as written. That instruction was modified. It was presented in the form of instruction 24 and we believe it adds an element to the necessary proof to establish an affirmative defense of estoppel that is not properly a part of the law on quasi-estoppel as developed in such cases. It's Milne versus Anderson, 576 P.2d 109. And, Mr. Yalowitz will set forth our objections on the counterclaim instructions.

MR. YALOWITZ: Very briefly, Your Honor. LKSD also objects to the court's instruction number 26 and the court's failure to give LKSD's proposed instruction number 28, those two instructions are essentially offsetting instructions. Our objection goes to the weight of the instruction, deals with latent and patent

defects under the contract warranty and as discussed in our meetings on the instructions, our authority is the impacts--the BCA case is Impacts, Inc., Bill Mill, Platt Manufacturing Company, Wisconsin Machine Corporation, Ward Meat Company.

LKSD also objects to the court's failure to give instruction number 54(a), that instruction began, when a contractor such as plaintiff ADF, and dealt with implied warranties of modifications and designs by the contractor. In support of our objection on that instruction we cite the contract provision paragraph 46 and the Lewis versus Anchorage Asphalt Paving case. Those are all our objections, Your Honor.

THE COURT: Now, I told counsel off the record the other day that my usual procedure is to have the bailiff read a

supplemental instruction to the jury at the time that the jury would ordinarily cease deliberations each day, and that would be 6:00 p.m. all days, except the first day, today, which I intend to have them deliberate until 9:00. But the supplemental instruction is right here and I would like to place on record counsels' previously stated agreement that we can proceed with that sort of procedure. In other words, the bailiff will read the supplemental instruction to the jury and then hand them a signed copy from me each day.

The first day the supplemental will differ, gentlemen, in the time set forth, I will make instead of 7:00 p.m., it'll be 10:00 p.m. and the instruction will be read to them at 9:00 p.m., telling them that unless all of them wants to stay another hour, they should cease deliber-

ating at 9:00. Is that procedure and is that instruction acceptable, Mr. Hopkins?

MR. HOPKINS: It is, Your Honor.

THE COURT: Mr. Oles?

MR. S. OLES: Yes, Your Honor.

. . .

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, INC., d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations,	)	
Plaintiff,	)	
v.	)	
LOWER KUSKOKWIM SCHOOL DISTRICT,	)	
Defendant.	)	Case No. 3AN-82-280-CI

SPECIAL VERDICTS

We, the jury in the above-entitled case, find the following on the questions submitted to us:

PART I

Q 1. Was AD-F entitled under its contract with LKSD to complete the schools up to 11 months after the written contract completion date, subject only to payment of liquidated damages as set forth in the written contract provision? Answer "yes" or "no."

ANSWER: Yes

Proceed to Q 2.

Q 2. In the fall of 1979, did LKSD expressly or impliedly demand that AD-F complete its work earlier than AD-F was entitled to

complete it under the agreement between the parties? Answer "yes' or "no."

ANSWER: Yes

If your answer is "no," then proceed to Q 10.

If your answer is "yes," then proceed to Q 3.

Q 3. Did AD-F give timely notice, or was LKSD otherwise aware, that the school district's demand would lead to contractor claims for additional compensation? Answer "yes" or "no."

ANSWER: Yes

Proceed to Q 4.

Q 4. Did AD-F increase the pace of its construction as a result of the demand by LKSD? Answer

"yes" or "no."

ANSWER: Yes

If your answer is "yes," then proceed to Q 5., if your answer is "no," then proceed to Q 10.

Q 5. Did AD-F incur additional costs because it increased the pace of its construction as a result of the demand by LKSD? Answer "yes" or "no."

ANSWER: Yes

If your answer is "yes," then proceed to Q 6. If your answer is "no," then proceed to Q 10.

Q 6. Is AD-F estopped from claiming plaintiff had a right to complete plaintiff's work after the contract completion date? Answer "yes" or "no."

ANSWER: No

Proceed to Q 7.

Q 7. Did AD-F and LKSD mutually agree to change the completion date on Mekoryuk, Tununak, Goodnews Bay, and Quinhagak to July 1, 1980, and that AD-F would accept $75,676.00 as full compensation for that change? Answer "yes" or "no."

ANSWER: No

If your answer to Q 7. is "yes," you may not include in any amount you specify in your answer to Q 8. damages for any efforts AD-F undertook or costs it might have incurred in attempting to complete the four schools in question by July 1,

1980.

Proceed to Q 8.

Q 8. What amount of monetary damages, if any, resulted from AD-F's increased pace of construction pursuant to LKSD's demand.

ANSWER: $6,447,000

Proceed to Q 9.

Q 9. If your answer to Q 7. was "yes," what amount have you deducted from your answer to Q 8. because of that finding?

ANSWER: _____

Proceed to Q 10.

PART II

Q 10. LKSD has asserted the following counterclaims. Indicate on the line next to each counterclaim

item what amount, if any, you allow for that item, by inserting either "0" or an amount of money:

Chefornak water well	-0-
Eek water well	8,545.00
Eek fuel tank	6,608.00
Eek site restoration	3,000.00
Goodnews Bay septic system	262.00
Kwigillingok water collection system	970.00
Mekoryuk quonset hut	24,710.00
Mekoryuk roof flashing	35,566.00
Mekoryuk utilidor	3,924.00
Mekoryuk shower floor support	1,596.00
Mekoryuk gym/shop wall	-0-

Mekoryuk doors	600.00
Newtok gym floor	12,093.00
Newtok pipe chase	3,642.00
Quinhagak water line	1,325.00
Tuntutuliak sewage lagoon	10,654.00

DATED at Anchorage, Alaska, this 19th day of April, 1984.

S/Donald C. Brooks
FOREPERSON OF THE JURY

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, INC., d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations,	)	
Plaintiff,	)	
v.	)	
LOWER KUSKOKWIM SCHOOL DISTRICT,	)	
Defendant.	)	Civil Action No. 3AN-82-280

JUDGMENT

This action came on for jury trial on March 12, 1984, the parties appearing by and through counsel. The jury was duly

selected and the trial proceeded through April 16, 1984, at which time the jury was instructed and retired to deliberate. On April 19, 1984, the jury returned its verdict. The jury having found for plaintiff, and the Court, in accordance with said verdict, and being fully advised in the premises, does hereby enter Order of Judgment for Plaintiff.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs Alaska Diversified Contractors, Inc., and Fischbach and Moore of Alaska, Inc., a joint venture doing business as Alaska Diversified-Fischbach, be and hereby are awarded judgment against Lower Kuskokwim School District, a political subdivision of the State of Alaska, in the amount of $6,438,005, calculated as follows:

Per the verdicts of the jury	$6,447,000

plus stipulated retention & extras	104,500
less counterclaims allowed by jury	(113,495)
	$6,438,005

plus interest from May 1, 1980 to May 1, 1984, in the amount of $2,677,136.08, plus attorney fees pursuant to Civil Rule 82(a), in the amount of $911,514.20, plus costs as taxes by the Clerk in accordance with Civil Rule 79 in the amount of $28,368.92 (88 4-15-85), for a total judgment of $10,055,024.20 (88 4-15-85) at the rate of 10½% per annum until satisfied in full.

LET EXECUTION ISSUE.

DATED at Anchorage, Alaska this 10th day of May, 1984.

S/Milton Souter
Milton Souter
Judge of the Superior Court

THE SUPREME COURT OF THE
STATE OF ALASKA

LOWER KUSKOKWIM SCHOOL DISTRICT, Appellant, v. ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations, Appellees.	)	File No. 8-587 O P I N I O N [No. 3165 - March 13, 1987]

Appeal from the Superior Court
of the State of Alaska,
Third Judicial District, Anchorage,
Milton Souter, Judge

The Lower Kuskokwim School District (the School District) appeals a jury's

decision that it breached contracts with Alaska Diversified Contractors and Fischbach & Moore (ADF). The relevant contracts called for ADF to build several schools for the School District. At trial, the central dispute was over when completion was required.

The contracts state on their face that completion was required by August 31, 1980. ADF, however, presented evidence that the School District told ADF during a pre-bid conference it could actually complete construction up to eleven months later and that this was the purpose behind a contract provision which imposes only nominal liquidated damages for the first eleven months after August 31.

After work began, the School District pressured ADF to complete the schools by August 31, 1980. ADF employees testified

that they did accelerate the work pace in response to this pressure. ADF seeks compensation for its costs resulting from what it perceives as this unwarranted acceleration.

The jury found that the contracts entitled ADF to complete work later than the stated date. The jury found the School District liable for $6,447,000.00, although this amount was reduced by the School District's counterclaims. The School District has appealed on a number of issues.

The School District argues that the parol evidence rule bars the court or the jury from using its pre-bid statements to

contradict or vary the written contracts.[1]

The parol evidence rule bars evidence of prior negotiations or agreements to vary or contradict the terms of an integrated written contract. Johnson v. Curran, 633 P.2d 994, 995 n.1 (Alaska

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[1] 1. The School District in its pre-trial memorandum briefed the parol evidence rule, but evidently did not rely on the rule in making evidentiary objections. If the parol evidence rule were truly a rule of evidence, the School District would be considered to have waived the rule as a point on appeal because of its failure to object. However, the parol evidence rule is a rule of substantive law. Restatement (Second) of Contracts § 213, and comment a. Even if evidence is presented that would, except for the parol evidence rule, have the effect of altering an integrated agreement, such evidence is precluded from having that effect by the parol evidence rule. The School District preserved its right to raise the parol evidence rule as a point on appeal by requesting instructions as to the effect of the rule, and by objecting to the court's failure to give parol evidence rule instructions.

1981); Kupka v. Morloy, 541 P.2d 740, 747-48 n.9 (Alaska 1975). An integrated agreement is an agreement which is "adopted by the parties as a complete and exclusive statement of the terms of the agreement." Restatement (Second) of Contracts § 210(1) (1981).

Although the court below did not rule on whether the contracts were integrated, we can make that ruling because the question of integration is one for the court. Mitford v. de Lasala, 666 P.2d 1000, 1004 (Alaska 1983); Alaska Northern Development, Inc. v. Alyeska Pipeline Service, 666 P.2d 33, 37 (Alaska 1983), cert. denied, 464 U.S. 1041, 79 L. Ed. 2d 170 (1984); Restatement, supra § 209(2), and comment c.

First, we must determine whether the agreements are integrated. According to the Restatement: "Where the parties

reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression." Restatement, supra § 209(3).

Here, we have no doubt that the agreements were integrated. They contain 36 pages (plus supplementary provisions), of 60 specific articles, including detailed provisions on every subject from definitions to payment of taxes to cleanup responsibilities. In our view, it would be unreasonable to hold that the parties did not intend these provisions to embody their complete agreement. Or, put another way, the oral statements made at the pre-bid conference do not negate the lengthy and detailed written agree-

ments which the parties signed subsequently.

The next question is whether the evidence offered by ADF contradicts or varies the writings. In our view it does. The contracts state that completion was due on August 31, 1980. They also state that if the contractor, i.e., ADF, fails to complete the contracts by the deadline, the School District could terminate the contracts. ADF's evidence, however, indicates that ADF could complete construction eleven months after the deadline without breaching the contracts. That is, the School District could not use the threat of termination to force ADF to complete the project by August 31, 1980. Thus, since ADF's evidence contradicts the written agreements,

the parol evidence rule bars the court or the jury from using this evidence.

Given our conclusion that the written agreements were the complete and final agreements and that these agreements required completion by August 31, it follows that the School District did not modify or breach the agreements by requesting compliance with the deadline. Hence, we do not need to reach the remaining issues raised by the School District. The judgment below is REVERSED and the case REMANDED for disposition consistent with this opinion.

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, INC., d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations,	)
Plaintiff,	)
v.	)
LOWER KUSKOKWIM SCHOOL DISTRICT,	)
Defendant.	)

Case No. 3AN-82-280 Civil

VOLUME I

TRANSCRIPT OF M.O. GRANTING DEFENDANT'S MOTION FOR JUDGMENT AND COSTS; M.O. DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

BEFORE THE HONORABLE MILTON M. SOUTER
Superior Court Judge

Anchorage, Alaska
September 4, 1987
3:20 o'clock, p.m.

THE COURT: This is a very difficult conceptual situation for me deciding this motion because I couldn't be more certain that the Supreme Court was dead wrong in its decision in this case. But, that doesn't have anything to do with the decision I make at this time. Regardless of how certain I am of their error they have the right to err and I've got to follow it. And so, I'll follow it.

The question is to what extent did they decide the case. To what extent would it be inconsistent with their deci-

sion for me to decide at this time that the promissory estoppel theory has any remaining validity in this case, if there's any life left to it at all.

To review the remarks that I made at the outset here, the promise in question was made at the pre-bid conference, which was before the integrated agreement as found by the Supreme Court was signed. And certainly sufficient reliance occurred before the integration was signed to justify enforcing the promise if it was ever to be enforced.

The contractor, ADF, according to the evidence and certainly according to any common sense relied on what it was told at the pre-bid conference when it submitted its bid. And certainly there was a great deal of reliance at that time. Sure, there was reliance later on dealing with the fact that ADF submitted work

schedule plans which were not disapproved until substantially later, but the submission of work schedule plans and the lack of disapproval of them is not some theory--that's not the basis of the estoppel that the jury was instructed on.

Instruction 34 didn't deal with anything approaching that. Instruction 34 dealt with a promise that was element number one of the four or five numbered elements in instruction 34. A promise. It's clear that the only promise in question was the pre-bid promise regarding the intent of LKSD not to enforce its right to terminate prior to 11 months of grace.

So, it appears to me that in this case the detrimental reliance or promissory estoppel theory could have only one effect. And that would be to serve as a substitute for consideration. And it's a

substitute which isn't even needed. Certainly all sorts of considerations to support the contract that was entered into between the parties. The question is whether or not the contract included this additional term that was not in the written document. So, it isn't a lack of consideration that should be anybody's concern here.

The concern is whether or not as a matter of mutual assent this additional promise was in the agreement. And that's something that the parol evidence rule directly addresses. The parol evidence rule, in substance, says the agreement as a matter of law is what's in the integration. Anything that's inconsistent with that even if there was all the mutual assent in the world is not enforceable. It's the integration which is enforceable. And that's a rigid rule of law,

which we in this day of reasonable this and reasonable that and weasel word (ph) here, weasel word there (ph) in our law raise our hackles about. Thirty years ago nobody would have raised their hackles at all at that, the idea that we would have some rigidity to our contract law. God knows we need some rigidity somewhere in our law so we can make some plans business-wise. Thankfully, the property law still contains some clear rules, I think, but the clarity of contract law since 1936 or was it '33, when the first Restatement came out has declined very greatly. Look at Williston's (ph) version of contracts and then read Corbin's (ph) and then look at the Restatement 2d of Contracts. And you can certainly see an evolution toward ever greater uncertainty.

And we certainly have that in Alaska prior to this LKSD/ADF case. And Mr. Oles is right when he says that we all talked about the fact that the parol evidence rule was practically a dead letter in Alaska at the time this case went to trial. And it had been eroded so thoroughly in the JBL&K case was one of them - that no one has mentioned here today. Huett, Leavit, Martin & Kern (ph) I think was the name of it versus NBA or vice versa, NBA versus JBL&K, plus the cases that Mr. Oles cited in oral argument here.

The parol evidence rule appeared to be something that you just found some way around in Alaska. And it seemed to be the way the Supreme Court always did until this case.

So, anyway, parol evidence rule was applied here, clearly wrongly, I believe,

but nevertheless, applied. And it was applied to a promise which was made pre-integration and with respect to a promise concerning which the detrimental reliance necessary to justify enforcement of the promise occurred before the integration was signed.

I agree in that situation with the Onsome court (ph), Onsome Associates versus Kola Petroleum (ph), 760 F.2nd 442, Second Circuit, (1985), that there's no room for a claim of estoppel.

The LKSD motion for entry of judgment of granted. The ADF cross-motion is denied in its entirety. And I'll settle the form of judgment, get it signed, and you can take this back to the Supreme Court.

Having said all that I'm going to say one more thing. In making this decision I do with heavy heart because I agree

with the comments of the Seventh Circuit in the EHRET case to the effect that what has occurred here amounts to constructive fraud. Mr. Oles' comments are right on the mark. ADF relied on statements made by a government representative as to the way things were going to be at a pre-bid conference, those statements were admitted at trial, and nevertheless, ADF has to eat its losses. It's not fair. It's constructive fraud. It stinks. And it's not the way this case ought to be decided, but my hands are tied. So, that's it.

The LKSD motion is granted. ADF's motion--cross-motions are denied. The case is back on its way back to the Supreme Court.

The other thing I'll say is I do believe this is the intent of the Supreme Court. I think that they knew that this

promissory estoppel issue was in the case. They chose not to address it. And they reversed the decision of the trial court. I think it's a rotten result. And I think that the Supreme Court in deciding that this was an integrated contract went way beyond its proper function as an appellate court, a clearer example of that I can't even imagine, to hold that this contract was integrated when that was not even the subject of the evidence taking at the trial court, not the result of any finding by the trial court, and not even stated as an integration in the contract documents is just absolutely astounding. And I couldn't agree more--I couldn't disagree more with the Supreme Court's decision.

So, they may enjoy or not enjoy reading my comments in the event that they're showed to them. But at least

they can take heart even though I think their decision is a disaster I followed it to the best of my ability.

MR. NOURSE: Thank you, your Honor. We'll be submitting the form of judgment and costs, . . .

THE COURT: Thank you, Mr. Nourse.

MR. NOURSE: . . . et cetera, in the next week or two if that would be all right with the court.

THE COURT: That'd be fine. That will be fine. Thank you very much.

MR. NOURSE: Thank you, Your Honor.

THE COURT: It's been an interesting case from start to finish. I'm very nearly done with it. Throughout I've been supremely impressed with the performance of counsel on both sides. You, Mr. Nourse, because you were the primary proponent for your side, although Mr. Friedman did some work in the case,

and good work. And Douglas Oles and his father on the other. I think the quality of representation couldn't have been better. Could not have been better, period. I don't expect to see any better performance by lawyers any where, any time. Thank you.

MR. NOURSE: Thank you very much.

THE COURT: Court will be in recess.

THE CLERK: Court will be in recess subject to call.

MR. OLES: Your Honor?

THE COURT: Mr. Oles?

MR. OLES: May I ask just one question, it wasn't quite covered by Counsel's comment. Counsel has indicated that they are going to seek an award of attorney fees. And I was simply going to ask that the court require that in that event LKSD be required to submit a detailed itemization because as we know,

there were more than 50 depositions taken in the course of this trial by Lower Kuskokwim School District, of which only two or three were ever used at trial. So, we would like to make sure that . . .

THE COURT: I think that would be appropriate.

MR. NOURSE: We intend on doing that, Your Honor.

THE COURT: Very well. Thank you. Have a nice trip back to sunny Seattle.

MR. OLES: It is sunny, Your Honor.

THE COURT: Too sunny, isn't it. You've got a lot of forest fires . . .

(Court recessed)

(END OF PROCEEDINGS)

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, INC., d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations,	)
Plaintiff,	)
v.	)
LOWER KUSKOKWIM SCHOOL DISTRICT,	)
Defendant.	)

Civil Action No. 3AN-82-280

JUDGMENT AFTER APPEAL

This action came on for jury trial on March 12, 1984, the parties appearing by and through counsel. The jury was duly selected and the trial proceeded through April 16, 1984, at which time the jury was instructed and retired to deliberate. On April 19, 1984, the jury returned its verdict. The jury found for plaintiff, and the Court, in accordance with the verdict, entered judgment in favor of plaintiff on May 10, 1984. On appeal, the Supreme Court of the State of Alaska reversed the judgment on March 13, 1987. The Supreme Court held that defendant did not modify or breach its agreements with plaintiff by requesting compliance with the August 31, 1980, deadline for completion set forth in the written contract. The case having been remanded for disposition consistent with the Supreme

Court's decision, both parties moved for entry of judgment, said motions were briefed and oral argument was heard on September 4, 1987. This Court, being fully advised in the premises, does hereby enter this Judgment After Appeal for defendant.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the claims of plaintiff Alaska Diversified Contractors, Inc., and Fischbach and Moore of Alaska, Inc., a joint venture doing business as Alaska Diversified-Fischbach, against defendant Lower Kuskokwim School District be and hereby dismissed with prejudice;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant be and hereby is awarded judgment against plaintiff in the amount of the counterclaim allowed by the jury, $113,495.00; plus interest from June 1, 1981, to October 1, 1987, on the

difference between the counterclaim verdict ($113,495.00) and the stipulated retainage and extras ($104,500.00) in the amount of $5,981.68; plus attorney fees pursuant to Civil Rule 82(a) for prosecution of the counterclaim in the amount of $13,447.67; plus attorney fees pursuant to Civil Rule 82(a) for defense of plaintiff's claims in the amount of $_____; plus costs taxed by the Clerk in accordance with Civil Rule 79 in the amount of $_____; for a total judgment of $_____. The stipulated retainage and extras, in the amount of $104,500.00, shall be offset against the total judgment in partial satisfaction thereof. Interest shall accrue from October 1, 1987, on the unpaid balance of the total judgment at

the rate of 10-1/2% (percent) per annum until satisfied in full.

LET EXECUTION ISSUE.

DATED at Anchorage, Alaska this 27th day of October, 1987.

S/Milton Souter
MILTON SOUTER
Judge of the Superior Court

IN THE SUPREME COURT
OF THE STATE OF ALASKA

ALASKA DIVERSIFIED CONTRACTORS, INC., and FISCHBACH & MOORE OF ALASKA, INC., d/b/a ALASKA DIVERSIFIED-FISCHBACH, a joint venture of Alaska corporations,	)	Supreme Court File Nos. S-2508/S-2514
Appellant, Cross-Appellee,	)	Trial Court No. 3AN-82-280 Civil
v.	)	O P I N I O N
LOWER KUSKOKWIM SCHOOL DISTRICT,	)	
Appellee, Cross-Appellant.	)	[No. 3476 - July 28, 1989]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage
Milton Souter, Judge.

Before: Matthew, Chief Justice, Rabinowitz, Burke, Compton, and Moore, Justices.

MATTHEWS, Chief Justice.

On remand after our decision in Lower Kuskokwim School District v. Alaska Diversified Contractors, Inc., 734 P.2d 62 (Alaska 1987), both parties moved for judgment. After reviewing the memoranda of the parties and hearing oral argument, the trial court dismissed with prejudice the claims of Alaska Diversified Contractors and Fischbach & Moore (ADF) and entered judgment in favor of the school district in the amount of the counterclaim allowed by the jury, $113,495, plus interest, costs and attorney's fees, less a stipulated offset of $104.500. ADF appeals.

ADF contends that the trial court erred in failing to enter judgment in its favor on a theory of promissory estoppel or, in the alternative, failing to order a new trial on that theory. In addition,

ADF argues that this court should reconsider its prior decision.

A. Reconsideration of Prior Decision

We turn first to the contention that our prior decision should be reconsidered. The underlying facts are as follows:

> The relevant contracts called for ADF to build several schools for the School District. At trial, the central dispute was over when completion was required.
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> The contracts state on their face that completion was required by August 31, 1980. ADF, however, presented evidence that the School District told ADF during a pre-bid conference it could actually complete construction up to eleven months later and that this was the purpose behind a contract provision which imposes only nominal liquidated damages for the first eleven months after August 31.
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> After work began, the School District pressured ADF to complete the schools by August 31,

> 1980. ADF employees testified that they did accelerate the work pace in response to this pressure. ADF seeks compensation for its costs resulting from what it perceives as this unwarranted acceleration.

Lower Kuskokwim, 734 P.2d at 63.

We held that the contracts were integrated and that therefore they could not be varied by prior negotiations or agreements. Id. at 64. It followed that the school district did not breach the contracts by requiring compliance with the August 31 deadline. We therefore reversed the judgment in favor of ADF and remanded for a disposition consistent with the opinion. Id.

ADF now requests that we overrule this decision primarily because (1) it is contrary to "an overwhelming body of Alaska precedent which had as a practical matter rendered the parol evidence rule a dead letter in Alaska," and (2) this

court should not have determined that the contracts were integrated.

Our scope of review on the question of reconsideration is narrow. The doctrine of law of the case generally prohibits reconsideration of issues which have been decided in a prior appeal in the same case. Wolff v. Arctic Bowl, Inc., 560 P.2d 758, 763 (Alaska 1977). Former decisions will not be reconsidered absent "exceptional circumstances," Patrick v. Sedwick, 413 P.2d 169, 173 (Alaska 1966), a term which refers to clear error constituting a manifest injustice. White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940).

No such circumstances appear in this case. ADF's argument that our decision was contrary to an overwhelming body of precedent which had made the parol evidence rule a dead letter in Alaska

reveals a fundamental misunderstanding of the parol evidence rule.

ADF cites a number of cases "typified" by Wright v. Vickaryous, 598 P.2d 490, 497 (Alaska 1979), which hold that extrinsic evidence can be utilized in determining the meaning of a contract.2/

The parol evidence rule is a rule of substantive law which holds that an integrated written contract may not be varied or contradicted by prior negotiations or agreements. Before the parol evidence rule can be applied, three preliminary determinations must be made: (1) whether

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2/ Other cases cited by ADF include Mitford v. de Lasala, 666 P.2d 1000 (Alaska 1983); McMillan v. Anchorage Community Hosp., 646 P.2d 857 (Alaska 1982); Peterson v. Wirum, 625 P.2d 866 (Alaska 1981); Wessels v. State, Dep't of Highways, 562 P.2d 1042 (Alaska 1977); National Bank of Alaska v. J.B.L. & K., 546 P.2d 579 (Alaska 1976).

the contract is integrated, (2) what the contract means, and (3) whether the prior agreement conflicts with the integrated agreement.3/ Alaska Northern Dev., Inc. v. Alyeska Pipeline Serv. Co., 666 P.2d

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3/ Comment b to § 213 of the Restatement (Second) of Contracts (1981) states:

> Whether a binding agreement is completely integrated or partially integrated, it supersedes inconsistent terms of prior agreements. To apply this rule, the court must make preliminary determinations that there is an integrated agreement and that it is inconsistent with the term in question. . . . Those determinations are made in accordance with all relevant evidence, and require interpretation both of the integrated agreement and of the prior agreement. The existence of the prior agreement may be a circumstance which sheds light on the meaning of the integrated agreement, but the integrated agreement must be given a meaning to which its language is reasonably susceptible when read in light of all the circumstances.

33, 37-40 (Alaska 1983); cert. denied, 464 U.S. 1041, 79 L. Ed. 2d 170 (1984). Extrinsic evidence may always be received on the question of meaning.4/ Alyeska Pipeline Serv. Co. v. O'Kelley, 645 P.2d 767, 771 n.1 (Alaska 1982). Once the meaning of the written contract is determined, however, the parol evidence rule

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4/ Restatement (Second) of Contracts § 214 comment b states:

> Words, written or oral, cannot apply themselves to the subject matter. The expressions and general tenor of speech used in negotiations are admissible to show the conditions existing when the writing was made, the application of the words, and the meaning or meanings of the parties. Even though words seem on their face to have only a single possible meaning, other meanings often appear when the circumstances are disclosed. In cases of misunderstanding, there must be inquiry into the meaning attached to the words by each party and into what each knew or had reason to know.

precludes the enforcement of prior inconsistent agreements. Alaska Northern, 666 P.2d at 37.

ADF's contention that the parol evidence rule had become ineffective in Alaska is particularly untenable in light of Alaska Northern, where we explicitly recognized that in determining the meaning of a contract prior to the application of the parol evidence rule, extrinsic evidence should be consulted.5/ Id.

This is not to say that the parol evidence rule is easy to apply. There is an obvious tension between using extrinsic evidence of a prior agreement for the purpose of determining the meaning of an integrated contract, and barring the use

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5/ Alaska Northern was decided less than a year prior to the trial in the present case.

of a prior agreement to change an integrated contract once its meaning is determined. The evidence which is consulted to determining meaning may be the same evidence which is later excluded, or rendered irrelevant, by the parol evidence rule. However, this apparent conflict is made manageable in most cases by various practical rules. For example, while extrinsic evidence should be consulted in determining the meaning of a written contract, nonetheless "after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention." Restatement (Second) of Contracts § 212 comment b. Further, questions of interpretation of the meaning of written documents are treated as questions of law for the court except where they are

dependent for their resolution on conflicting extrinsic evidence. O'Kelley, 645 P.2d at 771 n.2; Restatement (Second) of Contracts § 212, comments d, e. The question of the meaning of a written contract, including a review of the extrinsic evidence to determine whether any of the extrinsic evidence is conflicting, is a preliminary question for the court. Where there is conflicting extrinsic evidence the court, rather than the jury, must nonetheless decide the question of meaning except where the written language, read in context, is reasonably susceptible to both asserted meanings. Alaska Northern, 666 P.2d at 39.

ADF's argument that this court could not have determined that the contracts were integrated also lacks merit. As we stated in our prior opinion, that ques-

tion is one for the court. Lower Kuskokwim, 734 P.2d at 63. See also Mitford v. de Lasala, 666 P.2d 1000, 1004 (Alaska 1983); Alaska Northern, 666 P.2d at 37; Restatement (Second) of Contracts § 209 & comment c. It is a question which this court is as well situated to decide as the trial court.6/ ADF's contention that by so ruling this court unconstitutionally deprived it of the opportunity to be heard as to the issue

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6/ See Restatement (Second) of Contracts § 212 comment d:

> Likewise, since an appellate court is commonly in as good a position to decide such questions as the trial judge, they have been treated as questions of law for purposes of appellate review. Such treatment has the effect of limiting the power of the trier of fact to exercise a dispensing power in the guise of a finding of fact, and thus contributes to the stability and predictability of contractual relations.

of integration lacks merit. ADF presented its arguments to this court. The evidence which would prove or disprove integration was admitted at trial for the purpose of proving the existence of a prior inconsistent agreement. The thrust of ADF's argument below was that the parties intended the prior agreement to survive the execution of the contract.

ADF also stresses the absence of an integration clause in the contracts.7/ However, the "Instructions to Bidders" form supplied to ADF contains a clause which is functionally equivalent to an

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7/ An example of an integration clause appears in Kupka v. Morey, 541 P.2d 740, 748 n.14 (Alaska 1975): "No representations, warranties, promises, guarantees or agreements, oral or written, expressed or implied, have been made by either party hereto with respect to this lease . . . except as expressly provided herein."

integration clause. It deals specifically with pre-bid oral instructions:

> Explanation to Bidders. Any explanation desired by bidders regarding the meaning or interpretation of the drawings and specifications must be requested in writing and with sufficient time allowed for a reply to reach them before the submission of their bids. Oral explanations or instructions given before the award of the contract will not be binding. Any interpretation made will be in the form of an addendum to the specifications or drawings and will be furnished to all bidders and its receipt by the bidder shall be acknowledged.

(Emphasis added.) The terms of this clause highlight the correctness of the ruling that these contracts were integrated. They were publicly bid contracts whose terms could not be modified materially except in a formal fashion, so that

all those interested in obtaining the contract would be treated equally.8/

We also reject as insubstantial ADF's remaining arguments as to reconsideration. Exceptional circumstances do not exist, thus the law of the case doctrine precludes reconsideration.

B. Promissory Estoppel

ADF contends that on remand the trial court should have entered judgment in its favor based on promissory estoppel. Alternatively, it contends that the court should have ordered a new trial based on this theory. Promissory estoppel resulted, according to ADF, from the School District's representations prior

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8/ See Kenai Lumber Co., Inc. v. LeResche, 646 P.2d 215, 221 (Alaska 1982); McKinnon v. ALPETCO, 633 P.2d 281, 287 (Alaska 1981).

to signing the contracts and ADF's resulting detrimental reliance. In effect, ADF contends that although parol evidence cannot be admitted to contradict the contracts, the same evidence may be admitted in order to show an enforceable promise supported by detrimental reliance.

ADF's promissory estoppel theory necessarily is controlled by this court's prior finding that the contracts at issue are integrated. Just as the parol evidence rule renders inoperative prior agreements based on consideration, it discharges prior agreements based on detrimental reliance. Peoples Nat'l Bank v. Bryant, 774 F.2d 682, 684 (5th Cir. 1985); Ansam Assoc., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442, 447 (2d Cir. 1985); Philadelphia Mffs. Mut. Ins. Co. v. Gulf Forge Co., 666 F. Supp. 519,

522 (S.D. Tex. 1982).[9] In Johnson v. Curran, 633 P.2d 994, 996 (Alaska 1981), we noted that "promissory estoppel is a principle applicable to situations where a promise unsupported by consideration is sought to be enforced . . . ." Since the promise in Johnson was supported by consideration -- the agreement by the promissee -- we held that promissory estoppel bore "no direct relevance to the case at bar," id., and treated the promise in question as barred by the parol evidence rule. The factual situation in the present case is parallel to that present in Johnson, and the same result is indicated. The trial court correctly rejected ADF's argument.

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[9] Contra Ehret Co. v. Eaton, Yale & Town, Inc., 523 F.2d 280 (7th Cir. 1975), cert. denied, 425 U.S. 943, 48 L. Ed. 2d 186 (1976).

AFFIRMED.